No. 02-1013

In The
SUPREME COURT
UNITED STATES OF AMERICA

Norman J. Bau
Petitioner,
vs.
Actamed Corporation
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA:

REPLY TO BRIEF IN OPPOSITION

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I. THIS MATTER RAISES A FEDERAL EQUAL PROTECTION ISSUE

Georgia case law stated: "Dictionaries may supply a plain and ordinary sense of a word," (Shopping Ctr. v. Basic Bus. Alternatives, Inc., 213 Ga App 722, 445 S.E.2d 824 (1994)). Webster's dictionary defines "party" as: one participating, or otherwise involved in something. (Norman J. Bau Affidavit, #12) [R-287]. When the Merger was approved by the Board of Directors of the Respondent on February 24, 1998, the Respondent began participating in the Merger and was involved in the Merger, hence became a "party to the Merger". The Court of Appeals of Georgia would not apply this Case Law to the present Action. The Court of Appeals of Georgia had no comment about this, in the Opinion.

The Georgia statute O.C.G.A. § 14-2-1103 states: "After adopting a plan of merger ... the board of directors of each corporation party to the merger [emphasis supplied by the Petitioner] ... shall submit the plan of merger ... for approval by its shareholders." The Georgia statute O.C.G.A. § 24-6-5 states: "Evidence of known and established usage shall be admissible to aid in the construction of contracts..." O.C.G.A. § 14-2-1103 calls the Respondent a "party to the merger" just after the plan of merger is approved by the Board of Directors, and submitted for approval to the shareholders. This occurred on February 24, 1998; hence the Respondent became a "party to the Merger" at this time. The Court of Appeals of Georgia would not apply this inference from this statute to the present Action. The Court of Appeals of Georgia had no comment about this, in the Opinion.

The Court of Appeals of Georgia would not apply these authorities to the present Action even though the Respondent provided no alternate authority that defined when the Respondent became a "party to the Merger". These omissions of action by the Court of Appeals of Georgia rise to the level of implicit partiality, and raise a Federal Equal Protection violation. This represents a compelling reason for review on a writ of certiorari.

II. THE FEDERAL EQUAL PROTECTION ISSUE WAS IMPLICITLY RAISED IN THE COURTS BELOW

The Petitioner cited the Case Law, Shopping Ctr. v. Basic Bus. Alternatives, Inc., 213 Ga App 722, 445 S.E.2d 824 (1994), and the dictionary definition of "party" in his brief to the Court of Appeals of Georgia. The Petitioner cited O.C.G.A. § 14-2-1103 and O.C.G.A. § 24-6-5 in his brief to the Court of Appeals of Georgia. The Court of Appeals of Georgia was silent, in its Opinion, relative to the above Case Law and Georgia statutes, in the determination of when the Respondent became a "party to the Merger". The Petitioner restated the dictionary definition of "party" in his Motion for Reconsideration to the Court of Appeals of Georgia, and again discussed its relevance as to when the Respondent became a "party to the Merger," and the Change in Control. The Petitioner restated O.C.G.A. § 14-2-1103 in his Motion for Reconsideration to the Court of Appeals of Georgia, and again discussed its relevance as to when the Respondent became a "party to the Merger". The Court of Appeals of Georgia was undoubtedly aware of the Equal Protection right to have these issues addressed. The Petitioner thereby directed the attention of the Court of Appeals of Georgia to this Case Law, O.C.G.A. § 14-2-1103,

and O.C.G.A. § 24-6-5, again, in the Motion for Reconsideration. The Equal Protection issue was thereby implicitly raised in the Court of Appeals of Georgia in a non-inflammatory manner. To have demanded a response to these issues in the Motion for Reconsideration, stating the Petitioner's Equal Protection Right, would have appeared contemptuous; a more polite approach was followed. It is not customary for the Court of Appeals of Georgia to remain silent on important issues raised by appellants. The Court of Appeals of Georgia was silent, again, on these issues in its response to the Motion for Reconsideration. The Court of Appeals of Georgia was certainly aware of the equivalence of the State and Federal Equal Protection guarantees.

The State guarantee of Equal Protection, and its violation, was raised to the Supreme Court of Georgia in the Petition for Certiorari. Certainly the Supreme Court of Georgia was aware of the equivalence of the State and Federal Equal Protection guarantees, and that a Federal issue was implicitly being raised by the Petitioner. The State guarantee of Equal Protection, and its violation, was again raised to the Supreme Court of Georgia in the Motion for Reconsideration. Again, the Supreme Court of Georgia was certainly aware that a Federal issue was implicitly being raised. The fundamental equivalence of the State and Federal guarantees is basic.

III. RESPONDENT'S STATE LAW ARGUMENTS AND THE FACTS ARE INCONGRUOUS

The Respondent's argument on pages 8-10 of the Brief in Opposition is flawed. The Respondent cites O.C.G.A. § 14-2-1103(a), "After adopting a plan of merger ... the board of directors of each corporation party to the merger ... shall submit the plan of merger ... for approval by its shareholders." This proves the Respondent's argument to be incorrect, because it shows that the Merger was a process that spanned several months, commencing at the approval by the Board of Directors, and completed upon the approval by the Shareholders. The Respondent became a "party to a merger" upon its approval by the Board of Directors, and continued to be a "party to a merger" while this process ran its course. The Merger was occurring while this process was occurring. Should the Merger have been aborted, the Respondent would have been a "party to a merger" which failed.

In footnotes 2 and 3 on pages 8 and 10, respectively, of the Brief in Opposition, the Respondent takes the Petitioner's words completely out of context. The Petitioner stated, "The words of the Agreement defining 'Change in Control' are precise and clear." Section 1(c) of the Agreement stated, "A 'change in control' of the Company shall be deemed to occur if ... the Company is a party to a merger ... pursuant to which the company ... survives as a subsidiary of another corporation." **This** part of the Agreement **defines 'Change in Control'** and **this** part of the Agreement **is** precise and clear: **The Change in Control began when the Respondent became a party to the Merger, when the Board of Directors approved the Merger; the Change in Control ended when the Respondent survived as a subsidiary of Healtheon.** The remainder of Section 1(c) **does not define** 'Change in Control,' and **this** part **is not** precise or clear. Specifically, "... in the event of a 'change in control' of the Company while the Optionee is in 'continuous employment with the Company' ..." is ambiguous, because the Change in Control is occurring, but not completed, while the Petitioner is in continuous employment. The

Respondent takes this completely out of context.

IV. CONCLUSION

The preceding argument has documented why a Federal Equal Protection issue exists, how the Federal Equal Protection issue was implicitly raised in the courts below, and why the Respondent's State Law arguments are invalid. For all the foregoing reasons, and the reasons outlined in the Petition, the Petitioner respectfully prays that the Petition for Writ of Certiorari be granted, and that this ultimately leads to a reversal of the decision of the Court below.

Dated: February 14, 2003

Respectfully submitted,
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